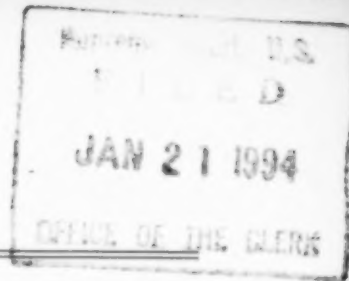


No. 93-6497



In The
Supreme Court of the United States
October Term, 1993

FRANK B. McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Texas Resource Center
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Suite 215
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(713) 522-5917
Counsel for Petitioner

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Petition For Writ Of Certiorari Filed October 26, 1993
Writ Of Certiorari Granted November 29, 1993

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RELEVANT DOCKET ENTRIES

U.S. District Court
Northern District of Texas (Fort Worth)

CIVIL DOCKET FOR THE CASE #: 93-CV-714

- 10/22/93 1 MOTION by Frank Basil McFarland to proceed in forma pauperis
- 10/22/93 2 MOTION by Frank Basil McFarland to stay execution, and for appointment of counsel
- 10/25/93 3 ORDER denying [2-1] motion to stay execution, denying [2-2] motion for appointment of counsel, denying [1-1] motion to proceed in forma pauperis (signed by Judge McBryde)
- 10/26/93 4 Pro Se Application by Frank Basil McFarland for certificate of probable cause to authorize appeal and certification that appeal is in good * * * STRICKEN PER ORDER FILED 10/26/93 * * *
- 10/26/93 5 MOTION by Frank Basil McFarland for leave to proceed in forma pauperis on appeal
- 10/26/93 6 NOTICE OF APPEAL by Frank Basil McFarland from Final Judgment and Order denying Petitioner's stay of execution and refusing to appoint counsel.

10/26/93 7 ORDER denying motion for leave to proceed in forma pauperis on appeal, striking application for certificate of probable cause to authorize appeal and certification that appeal is in good faith (signed by Judge McBryde)

[Seal]

Don Leonard
District Judge
Criminal District Court No. 3
Tarrant County Justice Center
Fort Worth, Texas 76196-0215

August 16, 1993

Mr. Frank Basil McFarland
Ellis I Unit, Route 6
Huntsville, Texas 77343

Dear Sir:

Enclosed you will find a certified copy of this Court's order of August 16, 1993.

Please note that the order sets your execution date for September 23, 1993.

Sincerely,

/s/ Don Leonard
JUDGE, Criminal District
Court #3

Encl.

cc: S. O. Woods, Director
Records and Classifications
P. O. Box 99
Huntsville, Texas 77340

Andrea L. March
Assistant Attorney General
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401 W. Belknap
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Thomas Lowe, Clerk
Court of Criminal
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P. O. Box 12308
Austin, Texas 78711

Jack Strickland
Defense Attorney
909 Throckmorton St.
Fort Worth, Texas
76102

IN CRIMINAL DISTRICT
COURT NUMBER THREE OF
TARRANT COUNTY, TEXAS
NO. 0336837D

THE STATE OF TEXAS §
VS. §
FRANK BASIL MCFARLAND §

ORDER SETTING EXECUTION

The Texas Court of Criminal Appeals having affirmed Defendant's conviction on September 23, 1992, and mandate having issued on March 12, 1993, and mandate having been received from the Court of Criminal Appeals in the above styled and numbered cause, the Court now enters the following order:

IT IS ORDERED that the Defendant, Frank Basil McFarland, who has been adjudged to be guilty of Capital Murder as charged in the indictment and whose punishment has been assessed by the verdict of the jury and judgment of the Court at Death, shall be kept in custody by the Director of the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, until Thursday, the 23rd day of September, 1993, upon which day, at the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, at some hour before sunrise, in a room arranged for the purpose of execution, the Director, acting by and through the executioner designated by the Director as provided by law, is commanded to carry out this sentence of death by intravenous injection of a substance or substances in a lethal

quantity sufficient to cause the death of Frank Basil McFarland and until Frank Basil McFarland is dead, such procedure to be determined and supervised by the Director of the Institutional Division of the Texas Department of Criminal Justice.

The Clerk of this Court shall issue and deliver to the Sheriff of Tarrant County, Texas, a certified copy of this order and a Death Warrant in accordance with this Order, directed to the Director of the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, commanding the Director to put into execution the Judgment of Death against Frank Basil McFarland.

The Sheriff of Tarrant County, Texas, is Ordered, upon receipt of the Death Warrant, to deliver the Death Warrant and a certified copy of this order to the Director of the Institutional Division of the Texas Department of Criminal Justice, Huntsville, Texas.

SIGNED AND ENTERED this 16th day of August, 1993.

/s/ Don Leonard
JUDGE PRESIDING,
Criminal District Court
Number Three of
Tarrant County, Texas

Texas Resource Center

September 19, 1993

Hon. Don Leonard
 District Judge
 Criminal District Court No. 3
 Justice Center
 401 Belknap St.
 Fort Worth, Texas 77701

Re: Ex Parte Frank Basil McFarland

Dear Judge Leonard:

I am writing you regarding Frank McFarland's *pro se* motion asking this Court to stay or withdraw his current execution date of September 23, 1993, so that he can obtain counsel to represent him in a post-conviction habeas corpus proceeding. At Mr. McFarland's request, the Center has agreed to recruit counsel for his post-conviction appeals, but have not, as yet, been able to do so.

As you know, the purpose of the Texas Resource Center is to ensure that indigent death row inmates in Texas have legal representation in state and federal habeas corpus appeals. The Center accomplishes this primarily by recruiting attorneys from the private bar to represent indigent death row inmates in these appeals and by consulting with and assisting those attorneys. So that we can recruit counsel for Mr. McFarland, I urge you to withdraw his execution date, allow us sufficient time for to recruit counsel, and grant new counsel an additional 120 days to investigate, research, prepare and file

an Article 11.07 habeas application. Given the nature and amount of work required to prepare a proper Article 11.07 application and the fact that few private attorneys would be able to devote 100% of their time to the case because of other obligations, 120 days is imminently reasonable.

The Center will make every effort to recruit counsel for Mr. McFarland as soon as possible. Given the current number of death row inmates without counsel and the posture of those cases relative to Mr. McFarland's, I estimate that it will take a [sic] least 120 days from this date to do so. As noted below, Mr. McFarland is one of many who need representation, and his case cannot fairly be moved to the top of the recruiting list when so many others are in need of counsel and similarly situated. In the event counsel is recruited sooner, I will immediately notify the Court—

Alternatively, I urge you to withdraw the date, appoint and agree to pay counsel to represent Mr. McFarland in a habeas proceeding, and give that counsel 120 days in which to file the Article 11.07 application. Of Course, the Center would be available to consult with and assist appointed counsel.

The Center is mindful of the fact that in the past some district attorneys have suggested that our request for time to recruit counsel for state habeas proceedings is unnecessary and made merely as a delaying tactic. This is simply not true. To the contrary, representation of death row inmates in habeas proceedings is in a state of crisis because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row

inmates needing post-conviction representation is substantially increasing each year; and (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing. This crisis in capital representation was the subject of a recent study commissioned by the Texas Bar Association:

We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.

[T]he results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a voluntary program. Many lawyers are reluctant to take cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem most acute at this time.

A Study of Representation of Capital Cases in Texas, by the Spangenberg Group, at i-ii (emphasis added).

Presently, there are approximately *seventy* unrepresented inmates on Texas' death row who are in the post-conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by the Court of Criminal Appeals before Mr. McFarland's. When Mr. McFarland's execution date was scheduled, the Center was already facing imminent executions scheduled for six other unrepresented inmates.

The existence of an imminent execution date makes it virtually impossible to recruit an attorney. Few attorneys will consider taking a case without an assurance that they can become familiar with the case and provide adequate representation before being faced with an execution date. For this reason, in lieu of setting execution dates, the Center has been urging courts to enter scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application. In almost all cases in which this has happened, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline. The Center has not previously requested a scheduling order in Mr. McFarland's case because we were not notified of the sentencing hearing and only learned of the September 23rd execution date in a letter from Mr. McFarland after the court's order was entered.

I apologize to the Court for not providing the information in this letter immediately upon learning of the September 23 execution. Our delay in contacting the court was caused by the fact that the attorneys who handle recruitment and the problems of unrepresented death row inmates were dealing with numerous crises

during the first three weeks in September, including the scheduled executions for several other unrepresented inmates.

Again, I urge you to withdraw your order setting Mr. McFarland's September 23rd execution date and enter a scheduling order that allows 120 days for the recruitment of an attorney and an additional 120 days within which to file a state habeas application. This Court clearly has the power to do so under Art. 5, § 8 of the Texas Constitution. The previously stated position of the Tarrant County district attorney's office that the court can't withdraw an execution date in the absence of the filing of a state habeas petition ignores the Court's inherent jurisdiction over its orders, conflicts with the practices of trial courts all over this state, and is just wrong.

I or another attorney with our office will be happy to discuss our efforts to recruitment [sic] an attorney for Mr. McFarland with you and the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of Mr. McFarland's motion for hearing.

Sincerely,

/s/ Eden Harrington
Eden Harrington
Executive Director

cc: District Attorney,
Tarrant County
William Zapalac,
Assistant Attorney General

IN CRIMINAL DISTRICT COURT NO. 3
OF TARRANT COUNTY, TEXAS

EX PARTE FRANK
BASIL McFARLAND

Petitioner.

Case No. ____

ORDER

The motion to withdraw execution date and to permit the Texas Resource Center to locate new counsel to represent Frank McFarland in post-conviction proceedings having been heard and duly considered, it is hereby GRANTED, and ordered that:

1. The execution date of September 23, 1993 is hereby withdrawn;

2. The Texas Resource Center is granted one hundred twenty days in which to recruit new counsel to represent Frank McFarland in post-conviction proceedings. The Resource Center will immediately notify this Court when new counsel is located. New counsel will file a petition for writ of habeas corpus on behalf of Mr. McFarland within one hundred twenty days after notification of recruitment is filed with the Court.

DISTRICT JUDGE

IN THE CRIMINAL DISTRICT
COURT NUMBER THREE OF
TARRANT COUNTY, TEXAS
No. 0336837D

(Caption Omitted In Printing)

ORDER MODIFYING EXECUTION DATE

Having received the application to modify execution in the instant case, this Court is of the opinion that it should be granted in part.

Therefore, this Court now modifies its prevous [sic] order of August 17, 1993, setting execution date for September 23, 1993. IT IS NOW ORDERED that the death warrant issued pursuant to the August 17, 1993 order be in all things recalled. IT IS FURTHER ORDERED that FRANK BASIL McFARLAND be put to death by an executioner designated by the director of the Texas Department of Criminal Justice, Institutional Division, before the hour of sunrise on Wenesday, [sic] October 27, 1993.

IT IS ORDERED that the Clerk of the Court shall issue a death warrant in accordance with this order and deliver it ti [sic] the Director of the Texas Department of Criminal Justice, Institutional Division, at Huntsville, Texas.

SIGNED AND ENTERED this 20th day of September, 1993.

/s/ Illegible
JUDGE PRESIDING

[SEAL]

Don Leonard
District Judge
Fort Worth, Texas 76196-0215

September 27, 1993

Mr. Frank Basil McFarland
Ellis I Unit, Route 6
Huntsville, Texas 77343

Dear Sir:

Enclosed you will find a certified copy of this Court's order of September 20, 1993.

Please note that the order sets your execution date for October 27, 1993.

Sincerely,

/s/ Don Leonard
JUDGE, Criminal District
Court #3

Encl.

cc: S. O. Woods, Director	Thomas Lowe, Clerk
Records and Classifications	Court of Criminal
P. O. Box 99	Appeals
Huntsville, Texas 77340	P. O. Box 12308
Andrea L. March	Austin, Texas 78711
Assistant Attorney General	Texas Resource Center
P. O. Box 12548	Defense Attorneys
Austin, Texas 78711	3223 Smith, Suite 215
Tim Curry, District Attorney	Houston, Texas 770066
401 W. Belknap	
Fort Worth, Texas 76196-0201	

To the Director of The Institutional Division Texas Department of Criminal Justice, or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Institutional Division Texas Department of Criminal Justice or in the event of the death or disability or absence of both the Director of the Institutional Division Texas Department Of Criminal Justice and the Warden of the Institutional Division Texas Department Of Criminal Justice, to such person appointed by the Board of Directors of the Institutional Division Texas Department Of Criminal Justice, Greetings:

Whereas, on the 13TH day of NOVEMBER, A.D. 1989 in the CRIMINAL District Court No. THREE of Tarrant County, Texas, FRANK BASIL MCFARLAND was duly and legally convicted of the crime of Capitol Murder, as fully appears in the judgment of said Court entered upon the minutes of said court as follows, to-wit: Judgment attached and,

Whereas, on the 15TH day of NOVEMBER, A.D., 1989 the said Court pronounced sentence upon the said FRANK BASIL MCFARLAND in accordance with said said [sic] judgment fixing the time for the execution of the said FRANK BASIL MCFARLAND for before the hour of sunrise on WEDNESDAY, the 27TH day of OCTOBER, A.D., 1993 as fully appears in the sentence of the Court

These are therefore to command you to execute the aforesaid judgment and sentence any time before the hour of sunrise on the 27TH day of OCTOBER, A.D., 1993 by intravenous injection of substance or substances in a lethal quantity sufficient to cause death and until the said FRANK BASIL MCFARLAND is dead.

Herein fail not, and due return make hereof in accordance with law.

Witness my signature and seal of office on this the
29TH day of SEPTEMBER, A.D., 1993.

Issued under my hand and seal of
Office in the City of Fort Worth,
Tarrant County, Texas this 29th
day of SEPTEMBER, 1993.

THOMAS P. HUGHES,
CLERK OF THE DISTRICT
COURTS OF
TARRANT COUNTY, TEXAS

BY: Illegible Deputy

Texas Resource Center

October 16, 1993

Hon. Don Leonard
District Judge
Criminal District Court No. 3
Justice Center
401 Belknap St.
Fort Worth, Texas 77701

Re: *Ex Parte Frank Basil McFarland*

Dear Judge Leonard:

As you know, Mr. McFarland's execution was previously scheduled to occur on September 23, 1993. On September 20, 1993, Mr. McFarland filed a *pro se* motion informing the court of his desire to pursue relief in an Article 11.07 proceeding and his need for counsel and asking the court to withdraw or modify the order scheduling the execution so that the Texas Resource Center could recruit counsel. By letter dated September 19, 1993, Eden Harrington informed you that the Texas Resource Center had agreed to recruit habeas counsel for Mr. McFarland and urged you to grant Mr. Farland's motion. Ms. Harrington explained in her letter that an imminent execution date makes it virtually impossible for us to recruit *pro bono* counsel unless there is an assurance that the court will give recruited counsel sufficient time to review the record, investigate potential claims and prepare a proper habeas application. Additionally, Ms. Harrington explained that because of the large number of inmates needing state habeas counsel, the Center urges the Court to grant 120 days to recruit counsel and an

additional 120 days for recruited counsel to prepare and file an 11.07 application.

On September 20, 1993, in your absence, Judge Drago modified Mr. McFarland's execution date to October 27, 1993 in order to permit you to consider and rule on the Center's request and Mr. McFarland's motion. As the new executive director of the Resource Center, I am writing to you to reaffirm our willingness to recruit counsel for Mr. McFarland and to explain our need for additional time.

At this time despite our best efforts, we have been unable to secure counsel for Mr. McFarland. This lack of success is not surprising. Ms. Harrington explained the recruiting difficulties caused by imminent execution dates in detail in page three of her letter to you. Simply put, no competent lawyer will take on a highly complex case *pro bono*, where literally, life is at stake, without adequate time to prepare it. Her letter also accurately described the enormous gap between demand for volunteer counsel at the state habeas level and the supply of lawyers willing to undertake these cases *pro bono*. There is no realistic prospect of success of recruiting counsel for Mr. McFarland so long as he continually faces an execution date less than a month away and there are no assurances that recruited counsel will be given sufficient time to prepare a proper habeas petition.

However, given enough time, there is good reason to believe that we will be able to recruit counsel for Mr. McFarland. In the brief time since his date was modified, the Center has successfully recruited state habeas counsel for an inmate where the district attorney's office had

agreed to work out a filing schedule with recruited counsel and federal habeas counsel in a case where the federal court had granted sufficient time for recruited/appointed counsel to file a federal habeas petition.

Understandably, Judge Drago was unwilling to do more than modify Mr. McFarland's date to allow you the opportunity to fully consider this situation and decide on an appropriate course of action. I hope that you will seriously consider entering a scheduling order granting the Center 120 days to recruit counsel for Mr. McFarland and allowing recruited counsel 120 days to review the record, investigate the case, and file the state habeas application.

It is important to note that as the number of unrepresented inmates continues to grow, it is becoming increasingly difficult to find volunteer counsel to represent capital defendants in state habeas proceedings. More frequently, lawyers are willing to take these cases only if they can be appointed and paid. For this reason we are able recruit attorneys for federal court more quickly and more easily than we can for state court. If we were assured that the Court would exercise is [sic] discretionary power to appoint and pay counsel at a reasonable hourly rate, the difficulties recruiting counsel would be substantially reduced. In either event, new counsel will need approximately 120 days in which to prepare and file the state habeas petition to ensure that all available claims are properly raised.

We again urge you to consider and grant Mr. McFarland's *pro se* motion and enter an order that ensures him the assistance of counsel and one meaningful opportunity

to challenge his conviction and sentence in state habeas proceedings. We do this not as his counsel, but to bring the issue before the Court for your consideration in a reasonable way. A proposed order is enclosed for your consideration.

The Center will continue to assist the Court with this process. I or another attorney with our office will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with you and a representative of the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of any motions regarding Mr. McFarland's execution date. Thank you.

Sincerely,

/s/ Mandy Welch
Mandy Welch
Executive Director

cc: District Attorney,
Tarrant County
Peggy Griffey
Assistant Attorney General

IN CRIMINAL DISTRICT COURT NO. 3
OF TARRANT COUNTY, TEXAS

EX PARTE	:	
FRANK BASIL McFARLAND	:	Case No. 0336837D
Petitioner.	:	

ORDER

The motion to withdraw execution date and to permit the Texas Resource Center to locate new counsel to represent Frank McFarland in post-conviction proceedings having been heard and duly considered, it is hereby GRANTED, and ordered that:

1. The execution date of October 15, 1993 is hereby withdrawn;
2. The Texas Resource Center is granted one hundred twenty days in which to recruit new counsel to represent Frank McFarland in post-conviction proceedings. The Resource Center will immediately notify this Court when new counsel is located. New counsel will file a petition for writ of habeas corpus on behalf of Mr. McFarland within one hundred twenty days after notification of recruitment is filed with the Court.

DISTRICT JUDGE

IN THE TEXAS COURT OF CRIMINAL
APPEALS IN AUSTIN, TEXAS

Ex Parte)	
FRANK BASIL McFARLAND)	No. <u>71,016</u>
Petitioner)	

MOTION TO STAY EXECUTION DATE TO ALLOW
DEFENDANT TO OBTAIN AN ATTORNEY TO
PREPARE AND FILE A POST-CONVICTION
APPLICATION FOR WRIT OF HABEAS CORPUS

Frank Basil McFarland respectfully moves this Court to stay the order of Criminal District Court No. 3 setting my execution for October 27, 1993. I also ask the Court to enter an order remanding the case to the district court with instructions to allow me time for the Texas Resource Center to recruit an attorney to represent me and sufficient time thereafter for my attorney to prepare and file a post-conviction application for writ of habeas corpus pursuant to Texas Code of Criminal Procedure Article 11.07, or to appoint counsel for me.

In support of this motion, I state the following:

1. I was represented at trial by Tolly Wilson and Sharen Wilson. I was represented on direct appeal by Jack V. Strickland and in the Supreme Court by Isaiah S. Gant. Mr. Gant's representation was limited to my certiorari proceedings, and I now have no legal counsel. I have asked the Texas Resource Center (hereafter called "Center") to recruit new counsel for me.

2. On September 20, 1993, my execution date was modified from September 23, 1993 to the present date to give the judge of the trial court an opportunity to consider my request for a stay. While I appreciate that modification, it has ~~not allowed sufficient time for a lawyer to~~ be found for me. So far, the trial court has refused to stay or modify my execution date to allow sufficient time for counsel to be recruited for me.

3. I wish to seek post-conviction relief pursuant to Article 11.07 of the Texas Code of Criminal Procedure, and I need counsel to represent me. I cannot file an application for post-conviction habeas corpus relief because I lack the resources, training and knowledge to do so. The Center, at my request, is attempting to recruit counsel for such proceedings. An attorney from the Center assisted me in preparing this motion. A letter from Mandy Welch, Executive Director of the Texas Resource Center, informing the Court of the Center's recruitment efforts accompanies this motion as Appendix A. I ask the Court to give the Center the time Ms. Welch requests in the letter to recruit a lawyer for me.

4. For the reasons stated above, I respectfully urge this Court to grant this motion to ensure that I have meaningful access to legal representation in all available appeals before I am executed.

Respectfully submitted,

/s/ Frank B. McFarland
FRANK BASIL McFARLAND
Ellis I Unit
T.D.C.J. I.D. #963
Huntsville, TX 77343

Certificate of Service

I certify that an [sic] true and correct copy of foregoing motion was deposited with Federal Express on October 2nd, 1993 for delivery to the Tarrant County District Attorney's Office, 401 West Belknap Street, Fort Worth, Texas 76196.

/s/ Mandy Welch

Texas Resource Center

October 21, 1993

Texas Court of Criminal Appeals
201 West 14th Street
Austin, Texas 78701

Re: *Ex Parte Frank Basil McFarland*

Honorable Judges of the Court:

I am writing you regarding Frank McFarland's *pro se* motion asking this Court to stay his current execution date of October 27, 1993, so that he can obtain counsel to represent him in a post-conviction habeas corpus proceeding. At Mr. McFarland's request, the Texas Resource Center has agreed to recruit counsel for his post-conviction appeals, but has not, as yet, been able to do so. As the new executive director of the Resource Center, I am writing to you to report on the status of our effort to recruit counsel for Mr. McFarland's post-conviction appeals.

The Center, through letters to the district court, encouraged Judge Leonard of the trial court to enter scheduling orders rather than use execution dates to govern the progress of Mr. McFarland's case. Copies of those letters are attached. On September 20, a visiting judge modified Mr. McFarland's then-existing date by somewhat more than thirty days to the present date to enable Judge Leonard, who was out-of-town, to consider and rule on Mr. Farland's motion. This week, Judge Leonard

denied Mr. McFarland's request that his date be withdrawn or modified to enable him to obtain an attorney.

The Center has not yet secured counsel for Mr. McFarland for several reasons. First and foremost, the presence of an imminent execution date makes it virtually impossible to recruit counsel for him. Few attorneys will consider taking a case *pro bono* without an assurance that they will have time to become familiar with it and provide adequate representation before their client is executed. For this reason, in lieu of setting an execution date, the Center urges district judges to enter scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application. In most cases in which this has happened, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline.

In addition, the Center is facing the greatest crisis of unrepresented death row inmates since its inception. This crisis has come about because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post-conviction representation is substantially increasing each year; (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing; and (4) setting of execution dates for unrepresented inmates substantially decreases the Center's ability to recruit counsel.

Mr. McFarland's case is emblematic of the cases of many other unrepresented inmates on death row in

Texas. At present, seven inmates who have not yet pursued habeas corpus relief in any court and are unrepresented have execution dates before the end of the year. They are:

October 27	Frank McFarland (Tarrant County)
November 2	Kevin Zimmerman (Jefferson County)
November 3	Aaron Fuller (Dawson County)
November 10	Anthony Cook (Milam County)
November 18	Martin Vega (Caldwell County)
November 23	Michael Lockhart (Bexar County)
December 3	Orien Joiner (Lubbock County)

These men are among the approximately *seventy* unrepresented inmates on Texas, death row who are in the post-conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by this Court before Mr. McFarland's. When Mr. McFarland's execution date was scheduled, the Center was already facing executions scheduled for six other unrepresented inmates.

Representation of Texas death row inmates was the subject of a recent study commissioned by the Texas Bar Association. That study discusses the Texas crisis at length:

We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.

[T]he results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently

no funds are allocated for payment of counsel or litigation expenses at the state habeas level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a voluntary program. Many lawyers are reluctant to take cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem most acute at this time.

A Study of Representation of Capital Cases in Texas, by the Spangenberg Group, at i-ii (emphasis added).

There is no realistic prospect of success in recruiting counsel for Mr. McFarland while he has a date a few days, a few weeks, or even a month away. Because of the present backlog of unrepresented inmates, a minimum of 120 days is necessary for a successful recruitment effort. An assurance that the judge will exercise his discretion to order payment of attorney fees at a reasonable rate would greatly increase the Center's ability to recruit qualified counsel.

I respectfully suggest that it is time, in view of the large number of unrepresented death row inmates, for the Court to seriously review the representation crisis in post-conviction proceedings in capital cases and its

approach to it. This matter can best be dealt with in Texas, by Texas courts, with this Court's leadership. The Center is ready and willing to work closely with this Court, district courts, the Attorney General's office, and district attorneys to create some procedure that will allow sufficient time to recruit counsel while also addressing legitimate concerns of judicial economy and the orderly progression of capital cases. The current problem will be difficult to resolve, but will only worsen with continuing inaction.

I urge the Court to stay Mr. McFarland's execution and to grant the Center 120 days to recruit counsel for him, order the district court to order payment of counsel at reasonable hourly rate, and allow recruited or appointed counsel 120 days in which to file a state habeas application. Doing so will promote the orderly workings of the criminal justice system in capital cases and help to ensure the reliability of the verdicts in which the death penalty is assessed.

The Resource Center will continue to assist the Court with the process of providing representation to death row inmates. I will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with the court, the district attorney, and the Attorney General's office. I hope that we can work together to solve this representation

problem not only in Mr. McFarland's case, but in the cases of inmates similarly situated in the future.

Sincerely,

/s/ Mandy Welch
Mandy Welch
Executive Director

cc: District Attorney,
Tarrant County
Margaret Griffey
Assistant Attorney General

Texas Resource Center

September 19, 1993

Hon. Don Leonard
District Judge
Criminal District Court No. 3
Justice Center
401 Belknap St.
Fort Worth, Texas 77701

Re: *Ex Parte Frank Basil McFarland*

Dear Judge Leonard:

I am writing you regarding Frank McFarland's *pro se* motion asking this Court to stay or withdraw his current execution date of September 23, 1993, so that he can obtain counsel to represent him in a post-conviction habeas corpus proceeding. At Mr. McFarland's request, the Texas Resource Center has agreed to recruit counsel for his post-conviction appeals, but have not, as yet, been able to do so.

As you know, the purpose of the Texas Resource Center is to ensure that indigent death row inmates in Texas have legal representation in state and federal habeas corpus appeals. The Center accomplishes this primarily by recruiting attorneys from the private bar to represent indigent death row inmates in these appeals and by consulting with and assisting the attorneys. So that we can recruit counsel for Mr. McFarland, I urge you to withdraw his execution date, allow us sufficient time to recruit counsel, and grant new counsel at least 120 days to investigate, research, prepare and file an Article 11.07 habeas application. Given the nature and amount of

work required to prepare a proper Article 11.07 application and the fact that few private attorneys will be able to devote 100% of their time to the case, 120 days is imminently reasonable.

The Center will make every effort to recruit counsel for Mr. McFarland as soon as possible. As noted below, Mr. McFarland is one of many who need representation, and the Center presently has recruitment commitments in other cases. Given the current number of death row inmates without counsel and the posture of those cases relative to Mr. McFarland's, I estimate that it will take at least 120 days from this date to obtain counsel for Mr. McFarland. In the event counsel is recruited sooner, I will immediately notify the Court.

Alternatively, I urge you to withdraw your order seating [sic] the date, appoint and agree to pay counsel to represent Mr. McFarland in a habeas proceeding, and give that counsel 120 days in which to file the Article 11.07 application. Of course, the Center would be available to consult with and assist appointed counsel.

The Center is mindful of the fact that in the past some district attorneys have suggested that our request for time to recruit counsel are unnecessary and made merely as a delaying tactic. This is simply not true. To the contrary, representation of death row inmates in habeas proceedings is in crisis because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post-conviction representation is substantially increasing each year; and (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these

cases is decreasing. This crisis [sic] in capital representation was the subject of a recent study commissioned by the Texas Bar Association:

We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.

[T]he results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a voluntary program. Many lawyers are reluctant to take cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem most acute at this time.

A Study of Representation of Capital Cases in Texas, by the Spangenberg Group, at i-ii (emphasis added).

Presently, there are approximately seventy unrepresented inmates on Texas' death row who are in the post-

conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by the Court of Criminal Appeals before Mr. McFarland's. When Mr. McFarland's execution date was scheduled, the Center was already facing executions scheduled for six other unrepresented inmates.

The existence of an imminent execution date makes it virtually impossible to recruit an attorney. Few attorneys will consider taking a case without an assurance that they can become familiar with the case and provide adequate representation before being faced with an execution date. For this reason, in lieu of setting an execution date, the Center has been urging courts to enter scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application. In most cases in which this has happened, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline. The Center has not previously requested a scheduling order in Mr. McFarland's case because we were not notified of the sentencing hearing and only learned of the September 23rd execution date in a letter from Mr. McFarland after the court's order was entered.

I apologize to the Court for not providing the information in this letter immediately upon learning of the September 23 execution. Our delay in contacting the court was caused by the fact that the attorneys who handle recruitment and the problems of unrepresented death row inmates were dealing with numerous crises during the first three weeks in September, including the scheduled executions for several other unrepresented inmates.

Again, I urge you to withdraw your order setting Mr. McFarland's September 23rd execution date and enter a scheduling order that allows 120 days for the recruitment of an attorney and an additional 120 days within which to file a state habeas application. This Court clearly has the power to do so under Art. 5, § 8 of the Texas Constitution. The previously stated position of the Tarrant County district attorney's office that the court can't withdraw an execution date in the absence of the filing of a state habeas petition is clearly in error. It ignores this Court's inherent jurisdiction over its own orders and conflicts with the practices of trial courts all over this state.

I or another attorney with our office will be happy to discuss our efforts to recruit [sic] an attorney for Mr. McFarland with you and the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of Mr. McFarland's motion for hearing.

Sincerely,

/s/ Eden Harrington
Executive Director

cc: District Attorney,
Tarrant County
William Zapalac,
Assistant Attorney General

Texas Resource Center

October 16, 1993

Hon. Don Leonard
District Judge
Criminal District Court No. 3
Justice Center
401 Belknap St.
Fort Worth, Texas 77701

Re: *Ex Parte Frank Basil McFarland*

Dear Judge Leonard:

As you know, Mr. McFarland's execution was previously scheduled to occur on September 23, 1993. On September 20, 1993, Mr. McFarland filed a *pro se* motion informing the court of his desire to pursue relief in an Article 11.07 proceeding and his need for counsel and asking the court to withdraw or modify the order scheduling the execution so that the Texas Resource Center could recruit counsel. By letter dated September 19, 1993, Eden Harrington informed you that the Texas Resource Center had agreed to recruit habeas counsel for Mr. McFarland and urged you to grant Mr. Farland's motion. Ms. Harrington explained in her letter that an imminent execution date makes it virtually impossible for us to recruit *pro bono* counsel unless there is an assurance that the court will give recruited counsel sufficient time to review the record, investigate potential claims and prepare a proper habeas application. Additionally, Ms. Harrington explained that because of the large number of inmates needing state habeas counsel, the Center urges the Court to grant 120 days to recruit counsel and an

additional 120 days for recruited counsel to prepare and file an 11.07 application.

On September 20, 1993, in your absence, Judge Drago modified Mr. McFarland's execution date to October 27, 1993 in order to permit you to consider and rule on the Center's request and Mr. McFarland's motion. As the new executive director of the Resource Center, I am writing to you to reaffirm our willingness to recruit counsel for Mr. McFarland and to explain our need for additional time.

At this time despite our best efforts, we have been unable to secure counsel for Mr. McFarland. This lack of success is not surprising. Ms. Harrington explained the recruiting difficulties caused by imminent execution dates in detail in page three of her letter to you. Simply put, no competent lawyer will take on a highly complex case *pro bono*, where literally, life is at stake, without adequate time to prepare it. Her letter also accurately described the enormous gap between demand for volunteer counsel at the state habeas level and the supply of lawyers willing to undertake these cases *pro bono*. There is no realistic prospect of success of recruiting counsel for Mr. McFarland so long as he continually faces an execution date less than a month away and there are no assurances that recruited counsel will be given sufficient time to prepare a proper habeas petition.

However, given enough time, there is good reason to believe that we will be able to recruit counsel for Mr. McFarland. In the brief time since his date was modified, the Center has successfully recruited state habeas counsel for an inmate where the district attorney's office had

agreed to work out a filing schedule with recruited counsel and federal habeas counsel in a case where the federal court had granted sufficient time for recruited/appointed counsel to file a federal habeas petition.

Understandably, Judge Drago was unwilling to do more than modify Mr. McFarland's date to allow you the opportunity to fully consider this situation and decide on an appropriate course of action. I hope that you will seriously consider entering a scheduling order granting the Center 120 days to recruit counsel for Mr. McFarland and allowing recruited counsel 120 days to review the record, investigate the case, and file the state habeas application.

It is important to note that as the number of unrepresented inmates continues to grow, it is becoming increasingly to find volunteer counsel to represent capital defendants in state habeas proceedings. More frequently, lawyers are willing to take these cases only if they can be appointed and paid. For this reason we are able recruit attorneys for federal court more quickly and more easily than we can for state court. If we were assured that the Court would exercise is [sic] discretionary power to appoint and pay counsel at a reasonable hourly rate, the difficulties recruiting counsel would be substantially reduced. In either event, new counsel will need approximately 120 days in which to prepare and file the state habeas petition to ensure that all available claims are properly raised.

We again urge you to consider and grant Mr. McFarland's *pro se* motion and enter an order that ensures him the assistance of counsel and one meaningful opportunity

to challenge his conviction and sentence in state habeas proceedings. We do this not as his counsel, but to bring the issue before the Court for your consideration in a reasonable way. A proposed order is enclosed for your consideration.

The Center will continue to assist the Court with this process. I or another attorney with our office will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with you and a representative of the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of any motions regarding Mr. McFarland's execution date. Thank you.

Sincerely,

/s/ Mandy Welch
Executive Director

cc: District Attorney,
Tarrant County
Peggy Griffey
Assistant Attorney General

Court of Criminal Appeals

State of Texas
Box 12308
Capitol Station
Austin 78711
October 22, 1993

RE: Writ No. 25,518-01

Frank Basil McFarland

Dear Judge Leonard:

Enclosed herein is an order entered by this Court regarding the above-referenced applicant.

If you should have any questions concerning this matter, please do not hesitate to contact me.

Sincerely [sic],

/s/ John G. Jasuta
John G. Jasuta
Chief Staff Attorney

JGJ/bh

cc: Dist Attorney Tarrant County
401 West Belknap
Fort Worth, TX 76196

Mandy Welch
Texas Resource Center
3223 Smith Street
Suite 215
Houston, TX 77006

S. O. Woods
Records & Classifications
P.O. Box 99
Huntsville, TX 77340

Frank Basil McFarland
TDC #963
Ellis I Unit
Huntsville, TX 77343

EX PARTE FRANK BASIL
McFARLAND

WRIT NO. 25,518-01

Motion for Stay
of Execution
from TARRANT County

ORDER

This is a Motion to Stay Execution Date seeking a postponement of the scheduled execution date to allow Applicant to seek volunteer *pro bono* counsel to assist in the filing of an application for habeas corpus relief. This Court affirmed Applicant's capital murder conviction and resulting sentence of death on direct appeal. *McFarland v. State*, 845 S.W.2d 824 (Tex.Cr.App. 1992). The trial court has scheduled Applicant's execution to be carried out on or before sunrise on October 27, 1993.

Applicant has filed a motion to stay the execution to permit the recruitment of counsel for the purposes of researching and filing an application for a writ of habeas corpus. Upon due consideration, Applicant's motion is in all respects denied.

**IT IS SO ORDERED THIS THE 22ND DAY OF
OCTOBER, 1993.**

PER CURIAM

EN BANC

DO NOT PUBLISH

Clinton, Baird and Maloney, JJ., would grant the stay.
Miller, J., not participating

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

FRANK BASIL MCFARLAND

Petitioner,

vs.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division

Respondent.

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HABEAS
CORPUS

No. Illegible

PETITIONER'S PRO SE MOTION FOR STAY OF EXECUTION AND REQUEST FOR APPOINTMENT OF COUNSEL

Petitioner Frank McFarland, who is unrepresented, hereby seeks a stay of execution and appointment of counsel to assist him in post-conviction proceedings under 28 U.S.C. Sec. 2254. In support of this motion, Mr. McFarland states the following:

1. I am scheduled to be executed October 27, 1993 and do not have a lawyer to represent me. I have asked for a stay of execution and for a lawyer in the state courts, and they have refused. I was convicted and sentenced to death in the Criminal District court Number Three of Tarrant County, Texas on November 15, 1989. I was represented on appeal to the Texas Court of Criminal appeals by Jack V. Strickland, who withdrew after that court affirmed my conviction and sentence. I was represented in the United States Supreme Court by Isaiah S.

Gant, who represented me solely for purposes of drafting and filing my petition for writ of certiorari. I have not had a lawyer since Mr. Gant withdrew, nor have I had access to the assistance of counsel.

2. The trial court scheduled my execution without informing the Texas Resource Center, an organization that regularly recruits lawyers for people on death row in state and federal habeas corpus proceedings. I have asked the Resource Center to find a lawyer to represent me in state habeas corpus proceedings and before this Court in proceedings pursuant to 28 U.S.C. §2254. The Center has told me that it cannot represent me directly because of the large number of cases for which it is now directly responsible, but that it will work to recruit a lawyer for me. The Center has assisted me in preparing this motion and is giving the Court additional information concerning its situation by a letter attached to this motion as Exhibit A.

3. I wish to challenge my conviction and sentence under 28 U.S.C. Sec. 2254. I have never had a federal habeas petition filed on my behalf, and, as I mentioned, have never had the assistance of counsel in post-conviction proceedings. Under these circumstances, I am entitled to the assistance of counsel under 21 U.S.C. § 848(q)(4)(B) and under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Murray v. Giaratano*, 492 U.S. 1 (1989) (Kennedy, J., concurring).

4. I also believe I am entitled to a stay of execution. Any attorney this Court appointed must be given the opportunity to review my case, conduct the necessary

investigation, and file the appropriate pleadings. Since counsel cannot perform these tasks in the days remaining before my scheduled execution, unless this Court grants a stay of execution, the right to counsel will become meaningless. In addition, even apart from my right to counsel, this Court is required under 28 U.S.C. Sec. 2254 to conduct a meaningful review of my conviction and sentence, a review that cannot take place before my scheduled execution. I am entitled to a stay for that reason as well. Finally, this Court has jurisdiction to stay my execution under *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991).

5. For all those reasons, I respectfully request that this Court:

- a. stay my scheduled execution;
- b. appoint qualified counsel to represent me in post-conviction proceedings;
- c. allow newly appointed counsel a reasonable period, but not less than 120 days, in which to familiarize himself with my case and prepare the necessary pleadings, including a first petition for writ of habeas corpus.

Respectfully submitted,

/s/ Frank B. McFarland
 Frank Basil McFarland
 Proceeding *pro se*
 Ellis I Unit
 T.D.C.J. I.D. #963
 Huntsville, TX 77343
 (409) 295-5756

AFFIDAVIT OF VERIFICATION

STATE OF TEXAS)
) SS
 COUNTY OF WALKER)

Under the pains and penalties of perjury, I swear that I have read and assisted in the preparation of the foregoing *PRO SE* MOTION FOR STAY OF EXECUTION AND REQUEST FOR APPOINTMENT OF COUNSEL. I am familiar with its contents, and to the best of my knowledge and belief the matters set forth therein are true and correct.

/s/ Frank B. McFarland
 Frank Basil McFarland

Subscribed and sworn to before me this 19th day of October, 1993.

/s/ Casandra Valmond
 [SEAL]

My Commission Expires:

10/29/94

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of this MOTION FOR APPOINTMENT OF COUNSEL AND FOR STAY OF EXECUTION on all parties herein by facsimile transmission on October 22, 1993 to:

Andrea March
 Enforcement Division
 Office of the Attorney General
 209 West 14th Street
 Price Daniel, Sr. Building
 8th Floor
 Austin, TX 78701

/s/ Lynn B. Illegible

Texas Resource Center

October 22, 1993

United States District Court
Northern District of Texas, Fort Worth Division
202 U.S. Courthouse
501 W. 10th Street
Fort Worth, Texas 76102

Re: Frank Basil McFarland v. Collins

On October 27, 1993, Mr. Frank Basil McFarland, an unrepresented Texas death row inmate, is scheduled to be executed by the State of Texas. Mr. McFarland has filed a *pro se* motion with this Court seeking a stay of execution and appointment of counsel. Mr. McFarland's motion sets out the essential facts of his previous representation and current lack of the same.

As you may know, the Texas Resource Center has been designated by the Northern District of Texas as a federal community defender organization charged with the responsibility for recruiting counsel for unrepresented, death-sentenced inmates in federal habeas corpus proceedings and consulting with, training, and assisting recruited counsel. Although the Center provides direct representation for a limited number of inmates, it not sufficiently staffed to undertake representation of the large number of unrepresented Texas death row inmates whose cases are entering the collateral review stage.¹

¹ The Center is presently involved in some respect in 207 capital cases in Texas. The Center recently agreed to represent three inmates whose state habeas petitions are due, under

Mr. McFarland has informed the Texas Resource Center that he wishes to pursue collateral attacks on his conviction and sentence, and that he needs an attorney to represent him. Because of its current obligations in other cases and the time and resources required to recruit counsel for the growing number of unrepresented death row inmates, the Center is unable to represent Mr. McFarland. The Center has agreed to recruit an attorney for Mr. McFarland, but has not been able to do so.

At present, the Center is facing the greatest crisis of unrepresented death row inmates since its inception. This crisis has come about because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post-conviction representation is substantially increasing each year; (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing; and (4) the presence of an imminent execution date which makes it virtually impossible to recruit counsel.²

negotiated filing schedules, before the end of the year. One of those inmates, Richard Jones, has an execution date of November 2, 1993. Additionally, the Center is attempting to recruit counsel for more than 70 unrepresented inmates whose direct appeals have been affirmed.

² Few attorneys will consider taking a capital case without an assurance that they will have time to become familiar with it and provide adequate representation before their client is executed. However, in most cases in which the state courts have agreed to enter scheduling orders in lieu of setting execution dates, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline.

Mr. McFarland's case is emblematic of the cases of many other unrepresented inmates on death row in Texas. At present, seven inmates who have not yet pursued habeas corpus relief in any court and are unrepresented have execution dates before the end of the year. They are:

October 27	Frank McFarland (Tarrant County)
November 2	Kevin Zimmerman (Jefferson County)
November 3	Aaron Fuller (Dawson County)
November 10	Anthony Cook (Milam County)
November 18	Martin Vega (Caldwell County)
November 23	Michael Lockhart (Bexar County)
December 3	Orien Joiner (Lubbock County)

These men are among the approximately seventy unrepresented inmates on Texas, death row who are in the post-conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by this Court before Mr. McFarland's. Mr. McFarland's execution date was initially scheduled for September 23, 1993, without notice to the Center. At the time, six other unrepresented inmates were also facing imminent execution dates.

To assure that Mr. McFarland would have a meaningful review of the legality of his detention, the Resource Center provided him with a *pro se* request for a stay of execution and appointment of counsel which was filed in the state courts. The Center, through letters to the state district court, Hon. Judge Don Leonard presiding, encouraged that court to enter a scheduling order rather than use an execution date to govern the progress of Mr.

McFarland's case. Copies of those letters are enclosed. On September 20, a visiting judge in the state trial court modified Mr. McFarland's then-existing date by somewhat more than thirty days to the present date to enable Judge Leonard, who was out-of-town, to consider and rule on Mr. McFarland's motion. This week, Judge Leonard denied Mr. McFarland's request that his date be withdrawn or modified to enable him to obtain an attorney. Mr. McFarland filed a motion with the Texas Court of Criminal Appeals yesterday, October 21, 1993, setting forth his situation and asking the Court for a stay until he can obtain counsel. However, experience suggests that court will likewise refuse to grant a stay.

Mr. McFarland is thus compelled to come to this Court for a stay and appointment of counsel to protect his right to federal habeas review of the constitutionality of his conviction and death sentence. An indigent state prisoner seeking to vacate a death sentence in "any post conviction proceeding under section 2254 . . . of Title 28" is entitled to the appointment of one or more attorneys to represent him. 21 U.S.C. § 848(q)(4)(B). *See also Murray v. Giarratano*, 492 U.S. 1 (1989) (Kennedy, J., concurring).³

³ In *Giarratano*, a plurality of the Court held that a habeas petitioner under sentence of death has no constitutional right to counsel in post-conviction proceedings. The holding of the Court, however, is far more limited. In concurrence, Justice Kennedy stated that because *Giarratano* had received limited assistance of counsel, no error appeared in that case. Justice Kennedy was not willing to hold that a state could deny a death sentenced inmate access to *any* assistance of counsel in post-conviction proceedings – the issue presented in Mr. McFarland's case. Based on the dissenting and concurring views in *Giarratano*, therefore, the Resource Center believes Mr. McFarland is

Mr. McFarland is indigent and this court has jurisdiction to stay his execution "in order to appoint counsel to assist [him] in preparing and filing a petition for federal habeas corpus relief." *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991). Under 28 U.S.C. § 2251, United States district judges "before whom a habeas corpus proceeding is pending" clearly have authority to stay state court proceedings. Under 18 U.S.C. § 30006A, The Criminal Justice Act of 1964, and 21 U.S.C. § 848(q)(4)(B), the court not only has the authority to appoint counsel for a habeas corpus petitioner seeking relief from a death sentence, but has a statutory obligation to do so.

When confronted with a case in an almost identical procedural posture recently, Hon. Robert M. Parker, Chief Judge for the United States District Court for the Eastern District of Texas, ruled that a federal district court "has jurisdiction to stay his [petitioner's] execution 'in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief,'" *Mooney v. Collins*, No. 6:92cv254, slip op. at 2 (E.D. Tex. April 30, 1992) (quoting *Brown v. Vasquez*, 952 F.2d 1164, 1165 (9th Cir. 1991), cert. denied, ___ U.S. ___, 1992 WL 51827 (U.S.), 60 U.S.L.W. 3655 (U.S., Apr. 27, 1992) (No. 91-1425)).⁴ Judge Parker found that the circumstances there, which so closely parallel this case, satisfied the standard for a stay of execution set out in *Barefoot v. Estelle*, 463 U.S. 880 (1982). Judge Parker gave the Resource Center one hundred twenty days to recruit counsel for Mr. Mooney, and

entitled to counsel under the Sixth, Eighth, and Fourteenth Amendments.

⁴ A copy of Judge Parker's orders in *Mooney* are enclosed.

the Center notified the court within ninety days that counsel had been located. Judge Parker appointed the attorney located by the Resource Center to represent Mr. Mooney, and entered a scheduling order.

In a similar case, the Hon. Jorge A. Solis, United States District Judge for the Northern District of Texas, granted a stay of execution and ordered that legal counsel located by the Resource Center be appointed and given one hundred twenty days in which to prepare and file an amended petition for writ of habeas corpus. *Caldwell v. Collins*, No. 3:92CV1316-P (N.D. Tex. June 30, 1992). (Order enclosed). The Resource Center had located counsel for Mr. Caldwell shortly before his execution, but the state courts refused to stay or modify the execution date in order for his attorneys to prepare and file a habeas petition on his behalf.

In yet another case, the Hon. George P. Kazen, United States District Judge for the Southern District of Texas, granted a stay of execution and ordered that the Resource Center be given one hundred days from receipt of his order to recruit counsel to file an amended petition for writ of habeas corpus. *Hernandez v. Collins*, No. L-92-111 (S.D. Tex. August 21, 1992) (Memorandum Opinion and Order enclosed). The Resource Center located counsel for Mr. Hernandez within the allowed time. The state courts had refused to stay or modify the execution date to allow the Resource Center to recruit counsel. In his Memorandum Opinion, Judge Kazen noted, "The case reflects the ever-growing crisis concerning the obtaining of quality legal representation for indigent defendants sentenced to

death. As indicated in the filings, the number of scheduled executions is rising while the willingness of attorneys to represent such defendants is declining." *Id.* at 1.

Honorable Robert B. Maloney, United States District Judge for the Northern District of Texas, granted a stay of execution and ordered an amended federal habeas petition filed in 100 days in *Long v. Collins*, No. 3-92CV1889-T (N.D. Tex. September 15, 1992) (Order enclosed). Mr. Long had been scheduled to be executed on September 17, 1992. Shortly before the scheduled execution, counsel recruited just days earlier by the Resource Center filed a Motion for Appointment of Counsel and for Stay of Execution with the Court. Counsel noted the impossibility of completing more than a cursory review of parts of the record and pointed out issues that would eventually merit careful federal habeas review. Counsel's motion for a stay or modification of the execution date filed with the state trial court and Texas Court of Criminal Appeals, based upon lack of time to prepare a state habeas petition, was denied by both courts.

On January 22, 1993, the Honorable A. Joe Fish, United States District Judge for the Northern District of Texas, granted a stay of execution in *Sterling v. Collins*, No. 3-93CV0147-G (N.D. Tex. Jan. 22, 1993) (Order enclosed). Judge Fish took this action after a motion for stay or modification of the execution date filed by the Texas Resource Center with the state trial court and the Texas Court of Criminal Appeals, based on Mr. Sterling's lack of representation, was denied by both courts. Judge Fish gave the Resource Center 120 days to recruit counsel who could then prepare and file a proper amended habeas corpus petition.

These judges are not the only jurists who have found the reasoning of *Brown* persuasive regarding the granting of a stay. In *Steffen v. Tate*, No. C-1-92-495 (S.D. Ohio June 18, 1992), the court granted a stay to preserve its jurisdiction to hear an unexhausted ineffective assistance of counsel claim. (Order enclosed). In doing so, the Court said:

The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, [for a stay] petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in *McClesky* or any other decisions of the United States Supreme Court is to the contrary.

Id., slip op., 3-4.

As the director of the Resource Center, I urge this Court to take similar action in Mr. McFarland's case. If this Court stays Mr. McFarland's execution, I am confident we can recruit qualified counsel to accept an appointment so long as we can provide assurances that appointed counsel will have a least 120 days to prepare and file a federal habeas petition on Mr. McFarland's behalf. I will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with the court, and the Attorney General's office at any time. I hope that we can work together to solve this representation problem and

promote the orderly and careful review of Mr. McFarland's case.

Sincerely,

/s/ Mandy Welch
Mandy Welch
Executive Director

Enclosures
cc: Andrea March
Assistant Attorney General

ENCLOSURE

EOD 5-1-92

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

NELSON WAYNE MOONEY,

Petitioner,

vs.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

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*
*
* HABEAS
* CORPUS
* No. 6:92cv254
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ORDER APPOINTING COUNSEL AND STAYING EXECUTION

Before the Court as of 7:30 p.m. were: Petitioner's Motion for Appointment of Counsel and for Stay of Execution; Petitioner's Motion to Proceed *in Forma Pauperis*, with supporting affidavit. At approximately 7:30 p.m., the Court received Petitioner's Petition for Writ of Habeas Corpus, and thus it too is now before the Court.

Petitioner Mooney has no attorney to help him file his initial application for Writ of Habeas Corpus,¹ and yet he is scheduled to be executed by lethal injection shortly after midnight the morning of May 1, 1992.

¹ The federal habeas corpus statutes are codified at 28 U.S.C. §§ 2241-2255.

An indigent state prisoner seeking to vacate a death sentence in any post conviction proceeding under 28 U.S.C. § 2254 is entitled to the appointment of one or more attorneys to represent her. 21 U.S.C. § 848(q)(4)(B). Petitioner Mooney is indigent. See Petitioner's Motion to Proceed *in Forma Pauperis* (with supporting affidavit). And this Court has jurisdiction to stay his execution "in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief." *Brown v. Vasquez*, 952 F.2d 1164, 1165 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 1992 WL 51827 (U.S.), 60 U.S.L.W. 3655 (U.S., Apr. 27, 1992) (No. 91-1425).

Under 28 U.S.C. § 2251, United States District Court judges "before whom a habeas corpus proceeding is pending" have authority to stay state court proceedings. What Petitioner has filed with this Court – Motion for Appointment of Counsel and for Stay of Execution – can be interpreted as the functional equivalent of a petition for a Writ of Habeas Corpus, albeit with prayers for leave to amend so as to "assert all possible violations of his constitutional rights in his initial application." *Brown*, 952 F.2d at 1167 (citing *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1467 (1991)).² And based on the crisis filing of

² In *McCleskey*, the Supreme Court held that the doctrine of abuse of the writ barred a prisoner from asserting a constitutional claim in a subsequent federal habeas corpus proceeding when he had not raised the claim in his initial federal application and could not show either good cause for failure initially to raise the claim and prejudice resulting from such failure, or that a fundamental miscarriage of justice would result if the claim were not entertained. ___ U.S. ___, at ___, 111 S.Ct. 1454, at 1467. And in *Antone v. Dugger*, 465 U.S. 200, 205-206 & n.4 (1984) (per

Attorney Mandy Welch, on Petitioner Mooney's behalf, the Court is persuaded that Petitioner has satisfied the pertinent stay of execution factors.

The standard for issuing a stay of execution has been set out by the United States Court of Appeals for the Fifth Circuit many times:

In deciding whether to issue a stay of execution, [the court is] required to consider four factors: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Buxton v. Collins, 925 F.2d 816, 819 (5th Cir. 1991); *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988). Although in a capital case, "the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities (i.e. the other three factors) weighs heavily in the favor of granting the stay." *Byrne*, 847 F.2d at 1133; *Brogdon v. Butler*, 824 F.2d 338, 340 (5th Cir. 1987); *O'Bryan v. McCaskle*, 729 F.2d 991, 993 (5th Cir. 1984). As the United States Supreme Court has observed, "a death sentence cannot . . . be carried out by the State while substantial

curiam), the Court held that a habeas petitioner would not be excused from failing to file all claims because his counsel had to prepare the first petition in haste and did not have time to familiarize herself with the petitioner's case. See *McCleskey*, ___ U.S. ___, at ___, 111 S.Ct. 1454, at 1467.

legal issues remain outstanding" and the courts should not "fail to give non-frivolous claims of constitutional error the attention they deserve." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1982). Based on the points raised by Attorney Welch on behalf of Petitioner Mooney at pages 8 – 11 of Petitioner's Motion for Appointment of Counsel and for Stay of Execution, the Court finds all four *Buxton* factors satisfied – in light of the fact that the Court finds that the balance of the equities (*i.e.* the last three factors) weighs heavily in the favor of granting the stay.³

Moreover, this Court finds Petitioner is entitled to a stay of execution for the same reasons the Ninth Circuit in *Brown v. Vasquez*, 952 F.2d 1164, 1169 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 1992 WL 51827 (U.S.), 60 U.S.L.W. 3655 (U.S., Apr. 27, 1992) (No. 91-1425), found California State Prisoner John G. Brown deserved a stay: the application for the appointment of counsel to assist a death penalty prisoner in preparing a petition for federal habeas corpus relief, and for stay of execution, constitutes part of a "habeas corpus proceeding." In short,

[g]iven the fundamental importance of the writ, it is essential that it be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." [] The [Supreme] Court has "consistently rejected interpretations of the habeas corpus statute that would suffocate the

³ At approximately 7:30 p.m., the Court received Petitioner's Petition for Writ of Habeas Corpus. The Court finds the claims raised in this document likewise compel the conclusion that a stay of execution is in order in this case, under *Buxton*.

writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."

Brown, 952 F.2d at 1166 (quoting: *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973); and accentuating that the *Harris* admonition to interpret the federal habeas corpus statute with "initiative and flexibility" is especially important in cases like *Brown* – *i.e.*, those in which a death penalty prisoner facing execution has no counsel – in light of the Supreme Court's *McCleskey* decision) (citation omitted).

CONCLUSION

For the foregoing reasons, it is hereby ORDERED, ADJUDGED and DECREED that Petitioner's Motion is GRANTED, pending his habeas corpus proceeding. The Texas Resource Center is appointed as counsel on this habeas corpus matter.⁴

SO ORDERED.

SIGNED THIS THE 30TH DAY OF APRIL, 1992.

/s/ Robert M. Parker
HONORABLE ROBERT M. PARKER,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

⁴ The Texas Resource Center is a private, non-profit corporation designated by this Court as a Federal Community Defender Organization to recruit and designate private attorneys for appointment in federal habeas corpus proceedings. See *Addendum to Criminal Justice Act Plan* for the United States District Court for the Eastern District of Texas.

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JEFFERY CALDWELL,

Petitioner,

vs.

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent

)
)
)
) CIVIL ACTION
) NO. 3:92CV1316-P
)
)
)
)
)
)

ORDER

Before the Court are petitioner Jeffery Caldwell's Motion for Appointment of Counsel and for Stay of Execution; petitioner's Motion to Proceed *in Forma Pauperis*, with supporting affidavit; and petitioner's Petition for Writ of Habeas Corpus and Motion for Stay of Execution.

Petitioner has not had legal counsel to help him prepare and file an adequate initial Petition for Writ of Habeas Corpus, and he is scheduled to be executed by lethal injection shortly after midnight the morning of July 2, 1992.

Petitioner's motion for appointment of counsel is granted. The following attorneys are appointed to represent petitioner in this habeas corpus proceeding:

Nancy R. Vanderheider
Peter MacMillan

Mark Schneider
Rosenthal, Rondoni & MacMillan, Ltd.
7600 Bass Lake Road, Ste. 120
Minneapolis, Minnesota 55428
(612) 533-4938

They are granted 120 days within which to prepare and file an amended petition for writ of habeas corpus.

Petitioner's motion for stay of execution is also granted, and petitioner's execution, currently scheduled for July 2, 1992, is hereby stayed.

Petitioner is allowed to proceed without prepayment of costs and fees because he is indigent.

Dated this 30th day of June, 1992.

/s/ Jorge A. Solis
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

ROGELIO RANGEL HERNANDEZ,)
Petitioner,)

vs.)

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division)

Respondent.)

) HABEAS
) CORPUS
) No. CA-L-92-111

ORDER

Before the Court are petitioner Rogelio Hernandez' Motion for Appointment of Counsel and for Stay of Execution; petitioner's Motion to Proceed *In Forma Pauperis*, with supporting affidavit; petitioner's petition for Writ of Habeas Corpus and Motion for Stay of Execution.

Petitioner does not have legal counsel to help him prepare and file an adequate initial petition for writ of habeas corpus, and he is scheduled to be executed by lethal injection shortly after midnight the morning of August 21, 1992. Accordingly,

- 1) Petitioner's motion for stay of execution is granted, and petitioner's execution, currently scheduled for August 21, 1992, is hereby stayed;
- 2) The Texas Resource Center is given 100 days from receipt of this Order to recruit counsel for Mr. Hernandez who can prepare and file a proper amended habeas corpus petition;
- 3) Petitioner is allowed to proceed without payment of costs and fees because he is indigent.

Dated this 20th day of August, 1992.

/s/ George P. Kazen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

ROGELIO RANGEL HERNANDEZ,	*	
	*	
Petitioner,	*	
vs.	*	CIVIL ACTION
	*	NO. L-92-111
JAMES A. COLLINS, DIRECTOR,	*	
TEXAS DEPARTMENT OF	*	
CRIMINAL JUSTICE,	*	
INSTITUTIONAL DIVISION,	*	
Respondent.	*	

MEMORANDUM OPINION

Pending is Petitioner's motion for appointment of counsel and for stay of execution, followed by a petition for writ of habeas corpus attacking Petitioner's state court conviction in 1989. The original motion for stay was filed shortly before 11:00 a.m. today by fax transmission. The petition for writ of habeas corpus was filed at approximately 2:00 p.m. today, also by fax. Petitioner is scheduled to die by lethal injection some time after midnight. The stay is unopposed by the State of Texas.

The case reflects the ever-growing crisis concerning the obtaining of quality legal representation for indigent defendants sentenced to death. As indicated in the filings, the number of scheduled executions is rising while the willingness of attorneys to represent such defendants is declining. In addition to all other obstacles, the motion asserts that Hernandez cannot secure representation because of "the location of the county of his conviction."

Deciding whether to issue a stay of execution in the Fifth Circuit requires a consideration of four factors: 1) whether the movant has shown likelihood of success on the merits; 2) whether the movant has made a showing of irreparable injury if the stay is not granted; 3) whether the granting of the stay would substantially harm the other parties; and 4) whether the granting of the stay would serve the public interest. *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991). In a capital case, however, the movant need not always show a probability of success on the merits but must present a substantial showing that a serious legal question is involved and that the other three factors weigh heavily in favor of the stay. *Byrne v. Romer*, 847 F.2d 1130, 1133 (5th Cir. 1988).

The Court has examined the two grounds for relief, with corresponding subparts, in the petition for writ of habeas corpus. Hernandez has presented a substantial showing that serious legal questions are involved. At the same time, the other three *Buxton* factors weigh heavily in favor of granting the stay. If the stay is denied, the injury to Hernandez will be irreparable in the extreme – he will die. Granting the writ would not substantially harm the state, which has expressly indicated no objection to it. The public interest would be served by giving Hernandez a fair chance to be heard in federal court. As the United States Supreme Court has stated, “a death sentence cannot . . . be carried out by the State while substantial legal issues remain outstanding” and the courts should not “fail to give no frivolous claims of constitutional error the attention they deserve.” *Barefoot v. Estelle*, 463 U.S. 880, 888 (1982). Further, as indicated in the State’s response, this Court will eventually be required to expressly rule on

each issue raised in the petition, reviewing them in light of the appropriate state court records. It would be physically impossible to accomplish that task in the few hours remaining before the scheduled execution.

For the foregoing reasons, the motion for stay of execution will be GRANTED.

DONE at Laredo, Texas, this 20th day of August,
1992.

/s/ George P. Kazen
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

DAVID MARTIN LONG,

Petitioner.

vs.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division

Respondent.

CIVIL ACTION
No. 3-92CV1889-T

ORDER

Before the Court are Petitioner David Long's Motion for Appointment of Counsel and for Stay of Execution, and Petitioner's Motion for Leave to Proceed *in Forma Pauperis*, with supporting affidavit. On due consideration, Petitioner's Motion for Appointment of Counsel is GRANTED, and the following attorneys are appointed to represent Mr. Long in this matter:

Mr. Danny Burns
115 N. Henderson St.
Ft. Worth, Texas 76102-1940
(817) 870-1544

John H. Blume
1247 Sumter Street
Suite 303
Columbia, S.C. 29201
(803) 765-0650

Counsel are granted 100 days within which to prepare and file an amended petition for writ of habeas corpus.

This Court also finds on due consideration that Petitioner has satisfied the standards for a stay of execution as set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1982) and *Burton v. Collins*, 925 F.2d 816 (5th Cir. 1991). His Motion for Stay of Execution is accordingly GRANTED. Petitioner's execution, currently scheduled for September 17, 1992, is hereby stayed pending further order of this Court.

Petitioner's Motion for Leave to Proceed *In Forma Pauperis* is GRANTED.

Dated this 15th day of September, 1992.

/s/ Illegible
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GARY STERLING,)	HABEAS
Petitioner,)	CORPUS
vs.)	No. 3-93CV0147-G
JAMES A. COLLINS,)	(Filed Jan 22 1993)
Director, Texas Department)	
of Criminal Justice,)	
Institutional Division)	
Respondent.)	
_____)	

ORDER

Before the Court are petitioner Gary Sterling's Motion for Appointment of Counsel and for Stay of Execution; Motion to Proceed *In Forma Pauperis*, with supporting affidavit; and Petition for Writ of Habeas Corpus.

Petitioner does not have legal counsel to help him prepare and file an adequate initial petition for writ of habeas corpus, and he is scheduled to be executed by lethal injection shortly after midnight the morning of January 25, 1993. Accordingly,

- 1) Petitioner's motion for stay of execution is granted, and petitioner's execution, currently scheduled for January 25, 1993, is hereby stayed;
- 2) The Texas Resource Center is given 120 days from receipt of this Order to recruit counsel for Mr. Sterling who can then prepare and file a proper amended habeas corpus petition;

- 3) Petitioner is allowed to proceed without payment of costs and fees because he is indigent.

Dated this 22 day of January, 1993.

/s/ Illegible
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID JOSEPH STEFFEN,	:	Case C-1-92-495
Petitioner,	:	
	:	(Filed 92 JUN 18
vs.	:	PM 3:44)
	:	
ARTHUR TATE, JR., WARDEN,	:	
Respondent.	:	

MEMORANDUM AND ORDER

This matter is before the Court on the application of petitioner David Joseph Steffen for a stay of execution of his death sentence. Petitioner is scheduled to die in the electric chair on Tuesday, June 23, 1992.

On June 10, 1992, the same day the stay application was filed, the Court conducted an informal conference of counsel in chambers. Counsel for petitioner advised the Court that on June 2, 1992, an application for stay had also been filed in the Supreme Court of Ohio. At the time this action was filed, the Supreme Court of Ohio had not

yet acted on the application pending in that court. In deference to the Supreme Court of Ohio, and with the agreement of counsel, this Court withheld its ruling on petitioner's application pending a timely decision by the Supreme Court of Ohio. The Court scheduled an oral hearing for Wednesday, June 17, 1992 at 3:00 p.m., with the anticipation that the Supreme Court of Ohio might announce its decision earlier that day. The Court allowed counsel for the respondent until June 16, 1992 to file a memorandum contra the application for stay.

The oral hearing commenced at 3:00 a.m. on June 17 in the absence of a ruling by the Supreme Court of Ohio. At the close of the hearing, the Court took the matter under advisement.

The Court is now advised that the Supreme Court of Ohio has denied petitioner's application for stay. It has, thus become necessary for this Court to promptly rule on the pending application.

Petitioner filed his application for stay of execution of death sentence pursuant to 28 U.S.C. § 1651, commonly known as the All Writs Act. Petitioner seeks the stay in order to pursue his claim of ineffective assistance of appellate counsel according to the procedure recently set forth by the Ohio Supreme Court in *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). Petitioner contends that under *McCleskey v. Zant*, 111 S.Ct. 1454 (1991), he will have only one opportunity to pursue habeas corpus relief in federal court. Under the exhaustion doctrine, petitioner must first present all of his constitutional claim to the state court, and a habeas petition which

contains both exhausted and unexhausted claims is subject to dismissal. *Rose v. Lundy*, 455 U.S. 509 (1982). Petitioner thus intends to file his petition for habeas corpus in federal court after his claim of ineffective assistance of appellate counsel claim has been exhausted. Petitioner is invoking the All Writs Act to preserve this Court's jurisdiction until his habeas petition is filed. In addition to the All Writs Act, petitioner relies on 28 U.S.C. § 2251 and S.D. Ohio R. 106(d) in support of this Court's jurisdiction to grant the stay. Prior to a ruling by the Supreme Court of Ohio, respondent challenged the jurisdiction of this Court to grant the stay under any of the bases urged by petitioner.

The Court finds that it has jurisdiction to grant the stay pursuant to 28 U.S.C. § 1651 in order to preserve its potential habeas jurisdiction. *Brown v. Vasquez*, 743 F. Supp. 729 (D.C. Cal. 1990), *aff'd on other grounds*, 952 F.2d 1164 (9th Cir. 1992). Alternatively, this Court asserts jurisdiction pursuant to 28 U.S.C. § 2251 to grant the stay of execution. *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991) [sic], *cert. denied*, 112 S. Ct. 1778 (1992).

The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in *McCleskey*, or any other recent decisions of the United States Supreme Court is to the contrary. The Court also feels that, notwithstanding respondent's assertion that the exhaustion rule is not jurisdictional and has exceptions, petitioner should not have to risk what may be his only opportunity of federal review by filing a

petition for habeas corpus under 28 U.S.C. § 2254 prior to exhausting his claim of ineffective assistance of appellate counsel in the Ohio courts.

For the foregoing reasons, the Court shall enter an order staying execution of petitioner's death sentence until further order of the Court.

IT IS SO ORDERED.

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court

RETAIN THIS NUMBER-CUSTOMER
RECEIPT WILL BE MAILED TO YOU.
RB623511394US

Texas Resource Center

October 24, 1993

The Honorable John H. McBryde
Judge of the United States District Court
for the Northern District of Texas
401 U.S. Courthouse
501 West 10th Street
Ft. Worth, Texas 76102

Re: McFarland v. Collins, No. 4:93cv714-A

Dear Judge McBride:

I am writing to inform you of the status of Mr. McFarland's state court proceedings and to suggest a scheduling conference with respect to Mr. McFarland's federal habeas proceeding. Yesterday, the Court of Criminal Appeals denied Mr. McFarland's *pro se* motion for a stay of execution with three judges dissenting. A copy of the order is attached. Also, I have talked with Andrea March, Assistant Attorney General and attorney for Respondent Collins, regarding her position with respect to Mr. McFarland's request for a stay and appointment of counsel before this Court. Ms. March told me that her office will file a response to Mr. McFarland's motion on Monday, but that she was not able to advise me what that response will be.

In previous cases involving unrepresented inmates, the Attorney General's office took the position that a federal court does not have jurisdiction to enter a stay of execution unless a habeas petition is filed, but agreed that it would not oppose a stay so long as a "petition" was filed. In each of those cases, as in Mr. McFarland's case, we had not agreed to represent the inmate, we were not familiar with the trial record, and we were not able to file a properly investigated and researched habeas petition. Nevertheless, to avoid the Attorney General's opposition to a stay, we filed a shell or perfunctory habeas petition on behalf of the inmate with the understanding and expectation that the court would grant a stay, appoint counsel, and give appointed counsel a reasonable time to prepare and file an amended habeas petition. In some cases, recruited counsel was immediately available to accept an appointment. In all but one case, a stay was granted and available counsel was appointed and given time to file an amended petition or the Center was given additional time to recruit counsel. However, in the most recent case, *Gosch v. Collins*, (W.D. Tex.), the federal district court denied a stay the day before the scheduled execution and simultaneously denied a single issue habeas petition on the merits.¹

As I have explained to Ms. March, in light of *Gosch* we do not feel that we can file a perfunctory petition in

¹ The court later granted a stay on a "successor" petition filed about an hour before Mr. Gosch's scheduled execution. However, the restrictions imposed by law on a federal court's consideration of claims raised in a second or successor habeas petition virtually render such proceeding meaningless.

Mr. McFarland's case without an assurance that it will be recognized for what it is and not become Mr. McFarland's only vehicle for federal review of his conviction and death sentence. We do not represent Mr. McFarland, and under the circumstances, I feel very strongly that we should not take any action that makes it appear that he has counsel when in fact he does not. At the same time, we want to cooperate with the Court and the Attorney General to assure that Mr. McFarland has qualified counsel who is given sufficient time and resources to represent him properly. In this regard, I request that the Court schedule a conference that includes a Resource Center attorney and someone from the Attorney General's office to discuss an appropriate resolution of our dilemma.

I can be reached in our Houston office, (713) 522-5917, on Monday and in our Austin office, (512) 320-8300, on Tuesday. Thank you for your consideration.

Sincerely,

/s/ Mandy Welch
MANDY WELCH
Executive Director

Encl.

CC: Pam Murphy, Deputy Clerk

Andrea March, Assistant Attorney General

EX PARTE FRANK BASIL
McFARLAND

WRIT NO. 25,518-01

Motion for Stay of
Execution
from TARRANT County

ORDER

This is a Motion to Stay Execution Date seeking a postponement of the scheduled execution date to allow Applicant to seek volunteer *pro bono* counsel to assist in the filing of an application for habeas corpus relief. This Court affirmed Applicant's capital murder conviction and resulting sentence of death on direct appeal. *McFarland v. State*, 845 S.W.2d 824 (Tex.Cr.App. 1992). The trial court has scheduled Applicant's execution to be carried out on or before sunrise on October 27, 1993.

Applicant has filed a motion to stay the execution to permit the recruitment of counsel for the purposes of researching and filing an application for a writ of habeas corpus. Upon due consideration, Applicant's motion is in all respects denied.

**IT IS SO ORDERED THIS THE 22ND DAY OF
OCTOBER, 1993.**

PER CURIAM

EN BANC

DO NOT PUBLISH

Clinton, Baird and Maloney, JJ., would grant the stay.
Miller, J., not participating

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND	§	
Petitioner,	§	
	§	
VS.	§	
JAMES A COLLINS, DIRECTOR	§	NO.
TEXAS DEPARTMENT OF	§	4:93-CV-714-A
CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION	§	
	§	
Respondent.	§	

ORDER

(Filed Oct. 25, 1993)

Came on to be considered in the above styled and numbered action the motions of petitioner, Frank Basil McFarland ("McFarland"), (i) for stay of execution and request for appointment of counsel and (ii) for leave to proceed *in forma pauperis*. After having considered the motions and the response of respondent the court finds that the motions should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel at each of

the above mentioned stages. On August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to October 27, 1993. On October 22, 1993, McFarland filed the motions presently before the court.

Pursuant to 21 U.S.C. § 848 (g)(4)(B) a defendant in any post-conviction proceeding under 28 U.S.C. § 2254 or § 2255 who is or becomes financially unable to obtain adequate representation is entitled to the appointment of one or more attorneys. In the instant case, however, McFarland is not entitled to such an appointment because there is not "a post-conviction preceding [sic] under section 2254 or 2255 of Title 28" pending. Only when McFarland files such a petition (in complies [sic] with applicable federal and local rules) will the court have authority to grant the motions, if appropriate. *In Re Lindsey*, 875 F.2d 1502, 1504 (11th Cir. 1989). Moreover, because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution or grant *in forma pauperis* status. *Narvaiz v. Collins*, No. SA4-93-CA-0311 (W. D. Tex. April 21, 1993). McFarland has not provided the court with the "information and materials necessary to make a careful assessment of the merits" to determine whether a stay is warranted. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). Therefore,

The court ORDERS that the motions of McFarland (i) for stay of execution and request for appointment of

counsel and (ii) for leave to proceed *in forma pauperis* be, and are hereby denied.

SIGNED October 25, 1993.

/s/ JOHN McBRYDE
JOHN McBRYDE
United States District Judge

Certified a true copy of an instrument on file in my office on 10/26/93 NANCY HALL DOHERTY, Clerk, U.S. District Court, Northern District of Texas
By B. Garner Deputy.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND	§	
Petitioner,	§	
vs.	§	No. 4:93-CV-714-A
JAMES A. COLLINS, DIRECTOR,	§	(Filed
TEXAS DEPARTMENT OF	§	Oct. 26, 1993)
CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION	§	
Respondent.	§	

ORDER

FRANK BASIL MCFARLAND, who has been designated "Petitioner" in the above numbered proceeding, has filed in such proceeding a document entitled "*Pro Se* Application for Certificate of Probable Cause to Authorize Appeal and Certification that Appeal is in Good Faith" (hereinafter "Application") and another document entitled "Motion for Leave to Proceed *In Forma Pauperis* on Appeal" (hereinafter "Motion"). The Application states that it is being made pursuant to 28 U.S.C. § 2253. Section 2253 applies only to "a habeas corpus proceeding before a circuit or district judge". The proceeding docketed as 4:93-CV-714-A on the docket of this court is not now, and has never been, a habeas corpus proceeding. This was made clear by the order signed by the court October 25, 1993. Thus, the Application should not have been filed in this proceeding. Therefore,

The court ORDERS that the Application be, and is hereby, stricken from the record of No. 4:93-CV-714-A.

For the reasons stated in the order signed by the court October 25, 1993, the Motion should be denied. Therefore,

The court ORDERS that the Motion be, and is hereby, denied.

THE COURT SO ORDERS.

SIGNED October 26, 1993.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

Certified a true copy of an instrument
on file in my office on 10-26-93
NANCY HALL DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By B. Garner Deputy.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANK BASIL McFARLAND,)	
)	
Petitioner,)	CIVIL ACTION
)	NO. _____
vs.)	
JAMES A. COLLINS, Director,)	
Texas Department of Criminal)	
Justice, Institutional Division,)	
)	
Respondent.)	
_____)	

APPLICATION FOR CERTIFICATE OF PROBABLE
CAUSE AND MOTION FOR STAY OF EXECUTION

Petitioner is scheduled to be executed by the
State of Texas shortly after 12:00 a.m. on Octo-
ber 27, 1993.

*MANDY WELCH
JOE MARGULIES
BRENT NEWTON
Texas Resource Center
3223 Smith St., Ste. 215
Houston, Texas 77006
713-522-5917

*Counsel of record

Temporary Counsel for Petitioner¹

¹ Petitioner appeared *pro se* in the court below and in the state habeas courts. Counsel's representation on appeal is limited to the issues related to the denial of Petitioner's right to habeas counsel and access to the courts.

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANK BASIL McFARLAND,)	
)	
Petitioner,)	CIVIL ACTION
)	
vs.)	NO. _____
)	
JAMES A. COLLINS, Director,)	
Texas Department of Criminal)	
Justice, Institutional Division,)	
)	
Respondent.)	
_____)	

**APPLICATION FOR CERTIFICATE OF PROBABLE
CAUSE AND MOTION FOR STAY OF EXECUTION**

To the Honorable Judges of the Court of Appeals:

Believing that his appeal has merit and raises substantial constitutional questions which are the subject of debate among jurists of reason,² Petitioner respectfully requests that this Court grant his Application for a Certificate of Probable Cause (CPC) for Appeal from the order of the United States District Court for the Northern District of Texas, Fort Worth Division, refusing to stay Petitioner's imminent execution temporarily and appoint Petitioner, an indigent, federal habeas counsel pursuant to 21 U.S.C. § 848(q)(4)(B). (That order is attached to the Brief in Support of this Application as **Appendix A**). Petitioner also moves this Court to stay his execution so that this Court may have sufficient time to deliberate the many important issues raised in this Application.

² See *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

As the accompanying brief in support of this Application and Motion sets forth, there are numerous issues before the Court:

1. Whether Petitioner is automatically entitled to a certificate of probable cause.
2. Whether the district court had jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or The All Writs Act, 28 U.S.C. § 1651(a).
3. Whether, assuming *arguendo* that there was no statutory basis for jurisdiction, the constitution nevertheless required the district court to stay Petitioner's imminent execution so that habeas counsel could be appointed.
4. Whether, at a minimum, this Court should grant a temporary stay to preserve the subject matter of the appeal and so that this Court may exercise its inherent jurisdiction to determine whether it has jurisdiction.

These are substantial issues that warrant a grant of CPC and a stay of execution. The larger equities also favor granting a stay of execution in this case. See *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (habeas corpus "traditionally been regarded as governed by equitable principles"). A first-time indigent *pro se* capital habeas petitioner's attempt to invoke his constitutional and statutory rights to file a habeas corpus petition does not merit such expedited treatment. This is not a case where a habeas petitioner has abused the habeas process or otherwise acted in a dilatory manner. Indeed, Petitioner's direct appeal certiorari petition was denied by the Supreme Court in June of this year.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's Application for a Certificate of Probable Cause and Motion for Stay of Execution.

Respectfully submitted,

FRANK BASIL McFARLAND

By: /s/ Mandy Welch by express
permission Brent E. Newton

*Mandy Welch
Joe Margulies
Brent E. Newton
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917

fax (713) 522-2733
Temporary counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this APPLICATION FOR A CERTIFICATE FOR PROBABLE CAUSE AND MOTION FOR STAY OF EXECUTION has been hand-delivered to:

Enforcement Division
Office of the Attorney General
209 West 14th Street
Price Daniel, Sr. Building
8th Floor
Austin, TX 78701,

this 26th day of October, 1993.

/s/ Mandy Welch
by Express Permission
Brent E. Newton

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1954

FRANK BASIL MCFARLAND,

Petitioner,

VERSUS

JAMES A. COLLINS,
Director, Texas Department of Criminal Justice,
Institution Division,
Respondent.

Appeal from the United States District Court
for the Northern District of Texas

(October 26, 1993)

ON MOTION FOR STAY OF EXECUTION
AND APPOINTMENT OF COUNSEL

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:

Frank B. McFarland seeks *in forma pauperis* status and a certificate of probable cause to review the district court's denial of his application for a stay of execution and for the appointment of counsel to represent him in the filing and prosecution of a complaint for habeas relief. He also seeks from this Court a stay of execution.

We grant IFP but deny certificate of probable cause.

The only post conviction relief petitioner has sought in state court has been a number of motions to stay court ordered executions to permit the petitioner to obtain habeas counsel. The final motion for stay was denied by the Texas Court of Criminal Appeals on October 22. Thus, no post-conviction claims have been filed in state court alleging specific constitutional infirmities in his state court conviction and sentence. The only pleadings McFarland has filed in federal district court is a motion for stay of the state court ordered execution and request for appointment of counsel and a request for certificate of probable cause. McFarland seeks review of the district court's denial of those motions.

A Petitioner does not have a right to an automatic stay pending the filing of his first habeas corpus petition. *Autry v. Estelle*, 464 U.S. 1, 2 (1983). A United States Court may not stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to perfect or effectuate its judgments. 28 U.S.C. § 2283. Such an act of Congress exists in the form of 28 U.S.C. § 2251, but it authorizes stay only by a court before which a habeas corpus proceeding is pending. No habeas corpus proceeding was pending before the district court and none is pending here. A suit is pending when commenced. *In Re Conna-way*, 178 U.S. 421, 427-28 (1900). Federal Rule of Civil Procedure 3 makes it clear one commences a civil proceeding by filing a complaint with the court. That has not been done. We do not view the motion for stay and for appointment of counsel as the equivalent of an application for habeas relief. *Brown v. Vasquez*, 952 F.2d 1164, 1166 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992). We

do not, however, share the view of the Ninth Circuit in *Brown* that the filing of the motions at issue is sufficient to meet the requirement of § 2251 that a habeas proceeding be "pending" before we may stay state court proceedings. *Brown*, 952 F.2d at 1169. In fact, all of the "pro se" filings in this matter, which were prepared by the Texas Resource Center, show clearly that no habeas action is pending in any court.

Were we, by some legal alchemy, to ignore the foregoing, Appellant still could not prevail. He does not make the minimal showing necessary to establish entitlement to a stay. Appellant argues that he is entitled to appointment of counsel, and appointed counsel will require additional time to prepare the habeas petition. There is, however, no constitutional right to court appointed counsel in state post-conviction proceedings. *Coleman v. Thompson*, 111 S.Ct. 2546 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989). We are not prepared to accept the blanket assertion that, in this case, meaningful access to the courts necessarily means court appointed counsel. *Id.*

Additionally, to be entitled to a stay, Appellant must show, if not a probability of success on the merits, at least a substantial case on the merits when a serious legal question is involved. *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988). Appellant has not even indicated the issues that might be raised in a habeas application, much less shown a substantial case on the merits. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).¹

¹ There is yet another problem not addressed by any of Appellant's filings: the question of exhaustion of state remedies.

Accordingly the application for certificate of probable cause is denied. The motion for stay of execution and appointment of counsel is also denied.

Petitioner must exhaust state habeas remedies before he is entitled to relief on a federal habeas petition. 22 U.S.C. § 2254(b) (West 1985); *In Re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989). The numerous attachments to the papers filed show not only that no claims have been exhausted; but no post conviction claims have even been filed in state court. Thus, even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims.

AFFIDAVIT OF D'LENE TANNER

BEFORE ME, the undersigned authority, on this day personally appeared D'LENE TANNER, and upon oath did depose and say:

My name is D'Lene Tanner. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently the Felony Appeals Clerk for the District Clerk of Tarrant County, Texas. Part of my duties consist of the care, custody, and control of all court documents filed pursuant to appeals and writs of habeas corpus in Tarrant County, Texas. One of the court files which I have care, custody, and control of is the appeal in the case of *McFarland v. State*, No. 71,016 in the Court of Criminal Appeals.

The conviction and death sentence in that cause was affirmed by the Court of Criminal Appeals on September 23, 1992. Mandate was subsequently issued on March 12, 1993. The United States Supreme Court denied a petition for writ of certiorari in the cause on June 7, 1993.

A review of the records in my charge reveals that the defendant, Frank Basil McFarland, has never filed an application or motion for stay of execution in the trial court. It is the usual and normal practice of the district clerk to place any document filed in a case in the court's jacket with a file mark, to note the date the document was filed, and to enter the filing of the document into the minutes of the court's docket. The court's jacket for the case of *McFarland v. State*, No. 71,016, does not contain a

motion or request for stay of execution filed by the defendant, nor does the court's docket reflect that such a document was ever filed. A certified copy of the court's docket is attached hereto as Exhibit "A."

A review of the habeas corpus actions filed in Tarrant County reveal that Mr. McFarland has not filed a writ of habeas corpus in any Tarrant County court, particularly in the court of conviction, the Criminal District Court No. 3 of Tarrant County, Texas.

The record does contain a letter from Mandy Welch, Executive Director of the Texas Resource Center, addressed to Hon. Don Leonard, the presiding judge of Criminal District Court No. 3 of Tarrant County. This is the only communication, other than court orders, filed in the cause since the defendant's date of execution was set. A certified copy of this letter is attached hereto as Exhibit "B."

FURTHER AFFIANT SAYTH NOT.

/s/ D'Lene Tanner
D'LENE TANNER

STATE OF TEXAS §
COUNTY OF TARRANT §

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas

My Comm. Exp. 06/27/97 Commission Expires: 6/27/97

AFFIDAVIT OF EDWARD L. WILKINSON

BEFORE ME, the undersigned authority, on this day personally appeared EDWARD L. WILKINSON, and upon oath did depose and say:

My name is Edward L. Wilkinson. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently an assistant criminal district attorney for Tarrant County, Texas, and have served in that capacity for the past three years. As part of my duties as assistant criminal district attorney, I supervise all State's Responses to criminal writs of habeas corpus filed in Tarrant County, Texas. I am also the attorney of record in the case of *McFarland v. State*, No. 71,016.

On September 20, 1993, I talked via telephone with a representative of the Texas Resource Center, the Hon. Mandy Welch, regarding a stay of execution for Frank McFarland. Mr. McFarland's execution was then set for September 23, 1993. I explained to Ms. Welch that it was the State's position that under Rule 233 of the Texas Rules of Appellate Procedure a trial court lacked jurisdiction to issue a stay or withdraw an order setting execution absent the filing of a writ of habeas corpus under Article 11.07 of the Code of Criminal Procedure. I specifically informed her that if a writ of habeas corpus were filed, that the State would not only not oppose a stay, but that it would agree to it. Ms. Welch advised me that the Resource Center did not agree, and informed that several

other representatives of the Resource Center would personally seek and order from the court staying the execution.

Representatives of the Resource Center, the Hon. Maurie Levin and Annette M. Lamoreaux, came to my office that afternoon. I informed them that the presiding judge of the convicting court, Criminal District Court Three, was not available. They informed me that they would therefore instead seek a stay from the judge of Criminal District Court Four.

I appeared at a hearing in chambers of the Criminal District Court Four. I agreed on behalf of the State to reset the execution until October 27, 1993, so that the Resource Center could present its request for a stay to the presiding judge of Criminal District Court Three. At this hearing I again reiterated that the State did not oppose a stay in the event that a writ of habeas corpus were filed before, or contemporaneous with, a request for a stay.

I was contacted on either on [sic] September 13 or 14, 1993, by yet another member of the Resource Center. He asked if the State had changed its position. I replied that it had not, that it still maintained that the trial court had no jurisdiction to grant a stay absent the filing of a writ of habeas corpus.

The State's position even now remains the same: the State will not oppose, and in fact will agree to, a stay of execution if an application for writ of habeas corpus is properly filed in the cause.

FURTHER AFFIANT SAYTH NOT.

/s/ Edward L. Wilkinson
EDWARD L. WILKINSON

STATE OF TEXAS §
COUNTY OF TARRANT §

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas
Commission Expires: 6/27/97

My Comm. Exp. 06/27/97
w17:102293b.mi

AFFIDAVIT OF CHARLES M. MALLIN

BEFORE ME, the undersigned authority, on this day personally appeared CHARLES M. MALLIN upon oath did depose and say:

My name is CHARLES M. MALLIN. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently an assistant criminal district attorney for Tarrant County, Texas, and sever [sic] as the assistant chief of the appellate division. I have been employed by the Tarrant County District Attorney's Office for approximately three years.

In the course of my employment I have become familiar with the case of *Frank Basil McFarland v. State of Texas*. My involvement commenced when the case was affirmed by the Court of Criminal Appeals and the trial court, Don Leonard, Judge of Criminal District Court No. 3 of Tarrant County set an execution date after the mandate was issued. On at least one occasion, since the mandate issued on March 12, 1993, I communicated to a member of the Texas Resource Center that the Tarrant County District Attorney's office would not oppose a stay of execution, if the center would first file Mr. McFarland's post conviction writ of habeas corpus, pursuant to Tex. Code Crim. Proc. Ann. art. 11.07.

FURTHER AFFIANT SAYTH NOT.

/s/ Charles M. Mallin
AFFIANT

STATE OF TEXAS §
COUNTY OF TARRANT §

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas

Commission Expires: 6/27/97

My Comm. Exp. 06/27/97
w17:102293b.mi

AFFIDAVIT OF AFFIDAVIT OF BETTY MARSHALL

BEFORE ME, the undersigned authority, on this day personally appeared BETTY MARSHALL, and upon oath did depose and say:

My name is Betty Marshall. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently the assistant chief of the appellate division of the Tarrant County District Attorney's office.

On September 20, 1993, I received a telephone call from Eden Harrington, the executive director of the Texas Resource Center. She asked me to agree, on behalf of the State, to a stay of execution in the case of Frank Basil McFarland, who was then set for execution on September 23, 1993. I informed her that the State maintained that the trial court had no jurisdiction to enter a stay of execution or withdraw its order setting execution unless a writ of habeas corpus had been filed in the cause. I further assured her that if an application for writ of habeas corpus were filed on Mr. McFarland's behalf, the State would agree to a stay of execution by the trial court.

I have had no further discussions on the matter with Ms. Harrington or anyone else from the Resource Center.

FURTHER AFFIANT SAYTH NOT.

/s/ Betty Marshall
BETTY MARSHALL

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas
Commission Expires: 6/27/97
My Comm. Exp. 06/27/97

CLERK'S OFFICE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that on *January 19, 1993*, the Texas Resource Center checked out from this office the direct appeal, styled *Frank B. McFarland*, Case number *71,016* and returned same on *January 25, 1993*.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 22nd day of October, A. D., 1993.

(Seal)

/s/ Thomas Lowe
Thomas Lowe, Clerk
County of Criminal Appeals

By: /s/ Abel Acosta
Abel Acosta
Deputy Clerk

NAME: Frank B. McFarland CCRA# 71,016

CHECKED OUT BY: /s/ Jorge Delgada DATE: 1/19-93

RETURNED BY: /s/ Jorge Delgada DATE: 1/25/93

CHECKED OUT BY: _____ DATE: _____

RETURNED BY: _____ DATE: _____

CHECKED OUT BY: _____ DATE: _____

RETURNED BY: _____ DATE: _____

SUPREME COURT OF THE UNITED STATES

No. 93-6497

Frank B. McFarland,

Petitioner

v.

James A Collins, Director, Texas Department
of Criminal Justice, Institutional Division

ON PETITION FOR WRIT OF CERTIORARI to the
United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition.

November 29, 1993
